IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN

AT JODHPUR.

JUDGMENT

S.B.Civil Writ Petition No.4350/2004

Prakash Kumar Balochi.
vs.
Nrapendra Prakash Sharma and others.

Date : 14.9.2007

HON'BLE MR. PRAKASH TATIA, J.

Mr.DR Bhandari, for the petitioner.

Mr.A Bhansali, for the respondent no.1.

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BY THE COURT :

Heard learned counsel for the parties.

The petitioner has challenged the order dated 18.2.2003 by which the trial court dismissed the application filed under Section 65 of the Evidence Act.

Brief facts of the case are that the petitioner/defendant first gave a notice to the respondent/plaintiff for production of a document dated 19.6.1965 which according to the defendant was in

possession of the plaintiff and it bears the signatures of the plaintiff and his son. That notice was not replied by the plaintiff, then the defendant submitted an application under Section 65 of the Evidence Act for permission to produce secondary evidence and the defendant submitted photostat copy of the said document dated 19.6.1965.

In reply, the plaintiff submitted that the document is not in possession of the plaintiff or his son. It is also submitted that the document is a declaration and it could have been executed on requisite stamp paper. Since the document is not stamped, therefore, it is not admissible in evidence.

The trial court observed that it is not proved that there exists or existed original document of the photostat copy produced by the defendant. The trial court further observed that the plaintiff denied the existence of the document as well as his signatures over the document. The trial court also observed that it is not clear whether the document falls in the category of declaration or not and thereafter, the trial court further held that without proving existence of the original document, secondary evidence cannot be allowed to be taken on record nor can be admitted in evidence.

Learned counsel for the petitioner/defendant

submitted that the petitioner made all efforts to produce the original document in the Court and for that purpose, he gave notice under Section 66 of the Evidence Act to the respondent/plaintiff which was not replied by the respondent/plaintiff. But first time in reply to the petitioner's application under Section 65 of the Evidence Act, the respondent/plaintiff stated that the document is not in their possession and also denied the document to be in possession of Upendra Sharma. It is submitted that the trial court has not determined the nature of the document nor enquired about the existence of the original document and observed that for production of secondary evidence, one is required to prove the existence of original document. In this case, the trial court, without holding enquiry, merely on the basis of the affidavit of the plaintiff presumed that the original document was not in existence.

Learned counsel for the respondent/plaintiff submitted that the document was not relevant at all in view of the fact that the plaintiff's suit was for redemption of mortgage property and the trial court clearly held the plaintiff denied the existence of document and the document is not stamped. It is submitted that unstamped document cannot be admitted in evidence and the deficiency cannot be removed by paying

the stamp duty and penalty on copy of the original.

I considered the submissions of learned counsel for the parties and perused the reasons given by the trial court in the impugned order.

The petitioner/defendant's allegation is that the document is in possession of the plaintiff and that has been denied, then there is a photostat copy of the document on record. The defendant was entitled to prove the fact that the original was in existence and is in possession of the plaintiff and copy produced by the defendant is the photostat copy of the original document. The trial court also without determining the nature of the document observed that the document is not on proper stamps. Without determining the nature of the document, how the Court could have reached to the conclusion that the original document was not admissible in evidence for want of requisite stamp duty. The court has not given any opportunity to the petitioner to prove the facts which have been decided against the petitioner by the trial court.

In view of the above, in fact, the order of the trial court appears to be non-speaking on material question of law and has been decided merely on the assumptions drawn and by ignoring the facts stated by

the petitioner in the application of the petitioner and by accepting the reply of the plaintiff for the purpose of finding out whether the original document is in possession of the plaintiff or not ?

In view of the above reasons, this writ petition is allowed and the order dated 18.2.2003 is set aside. The trial court is directed to give opportunity to the petitioner/defendant to prove the existence of the document as well as its possession with the respondent/ plaintiff and all other issues referred above and thereafter, decide the petitioner's application about the permission to produce the secondary evidence.

(PRAKASH TATIA), J.

S.Phophaliya